91-223

CASE NO._____

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1991

JUGRAJ SINGH DHALIWAL

Petitioner,

v.

WOODS DIVISION OF HESSTON CORP and DAVID SCHIRER and MICHAEL DAWSON

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT Of CERTIORARI

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PRO-SE

QUESTIONS PRESENTED

1. Where findings of liability and awards of damages are unsupported by any evidence, should the findings be set aside as clearly erroneous?

2. Where the Defendants had already persisted for including a new term 61 days before the Plaintiff's request for changing one term, would it not be the Defendants, rather than the Plaintiff, who reneged the contract?

3. Where Defendants admit they did not discuss the no application provision and the trial court determines that this term was not a part of the agreement, did not the Defendants' absolute insistence that this term must be included in the agreement repudiate the agreement?

4. Can a Plaintiff be held liable for Defendants' attorneys' fees because the Plaintiff refused to sign Defendants' written draft agreement which contained not agreed-to terms and where the court later determines that the disputed terms were not a part of the oral agreement made before the court?

5. Should not a litigant be given an opportunity to respond to his attorney's motion to withdraw from the case?

6. Is it not an abuse of discretion on the part of the District Court to deny appointment of counsel when a litigant had furnished evidence that his case is strong, that he is unable to find an attorney, and that he is financially able and willing to pay the fees for a court appointed attorney?

PARTIES

The petitioner is Jugraj Singh Dhaliwal, a former employee of WOODS Division of Hesston Corporation.

The respondents are WOODS Division of Hesston Corporation, and David Schirer and Michael Dawson, individual agents of Hesston.

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DECISION BELOW

The May 17, 1991 order of the United States Court of Appeals in case #90-2212 denying the petition for rehearing is unreported. The April 16, 1991 decision of the United States Court of Appeals in case #90-2212 affirming the district judgement is unreported. The other part of the April 16, 1991 decision of the United States Court of Appeals is reported. The order of May 31, 1990 and the memorandum opinion and order of April 12, 1990 of the District Court are unreported.

JURISDICTION

The petition for rehearing the decision of the United States Court of Appeals for the Seventh Circuit affirming the judgement of the District Court was denied on May 17, 1991. Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1981:

Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

> white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

and Rule 52 (a) Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or without an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions

under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This case began as a suit by Petitioner against his former employer, charging discrimination on the basis of National Origin for denial of a promotion and denial of a pay raise in retaliation for opposing the employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. of 2000 (e) and Civil Rights Act of 1866, 42 U.S.C. of 1981. On October 25, 1989 the District Court conducted a settlement conference in this case. The Defendants' counsel prepared a draft written document allegedly memorializing the terms of the agreement reached on October 25, 1989. The written draft contained a paragraph which reads as follows:

> Plaintiff agrees that he will not apply for appointment with Defendant or any of Defendants' related parties at any location and that he hereby waives any right to apply to such employment, unless Defendant specifically agrees in writing to waive its rights under this paragraph (A-20).

On November 3, 1989, Defendants' Attorney Klock sent the written draft along with a letter to Plaintiff's Attorney Reese stating that:

> Enclosed please find a copy of proposed Settlement Agreement. Our client is absolutely insistent that a provision stating that Mr. Dhaliwal may not apply for employment with them be included in the agreement. Obviously, the concern is that Mr. Dhaliwal will apply for work, and if he is denied employment--whatever the reason--he will file another National Origin discrimination charge. In that case, they will be right back where they started, defending a discrimination claim, and will have paid $12, 000 for nothing. This type of provision is very standard in settlement agreements following employment discrimination claims.
>
> If this agreement is not acceptable to your client, we should schedule another settlement conference with Judge Roszkowski in order to attempt to resolve the dispute.
>
> If you have any questions or if you would like to discuss any of the provisions in the proposed agreement, please call.

Plaintiff's Attorney Reese sent a written reply explaining that:

> My client is unwilling to sign the settlement papers forwarded with the inclusion of the language indicating that he cannot reapply. This was not discussed nor made a part of our agreement anytime.

The Defendants admitted that the issue of future employment was not explicitly discussed. The Defendants arranged the second conference held on January 3, 1990, to finalize the agreement reached on October 25, 1989. The Defendants neither explained to the Plaintiff nor bring it to the notice of the District Court anytime form October 25, 1989 to April 9, 1990 for a period of 166 days that it is explicit in an agreement not to seek reinstatement that he will not apply for any other job with the employer in the future as they later argued at the evidentiary hearing on April 9, 1990. Defendants did not agree to take out this term from their written draft. Instead, the Defendants tried to negotiate this new term and took a firm stand that they would not allow the Plaintiff to apply for employment with them. The parties could not come to an agreement on January 3, 1990. The Plaintiff also placed his demand for higher compensations during these negotiations. This was clearly 61 days after the Defendants' insistence to include a new term.

The oral motion of Plaintiff's Attorney Brian P. Reese to withdraw as counsel for the Plaintiff was granted. The court did not allow Plaintiff any opportunity to oppose his attorney's motion. At the January 31, 1990 status hearing, Plaintiff's motion for appointment of counsel was denied citing that Plaintiff is currently employed and has the financial resources to hire or otherwise retain private counsel.

On February 3, 1990, Plaintiff proposed to Defendants to settle the case out of court. Defendants' attorney declined the offer on February 7, 1990 by a letter stating that:

> Our client would not be interested in another meeting to resolve this matter at this time.

On February 14, 1990, status hearing Defendants tendered the instant motion to confirm the settlement agreement containing material terms which were not discussed at the October 25, 1989 conference and not agreed upon at the final conference on January 3, 1990. Defendant also filed a petition for attorneys' fees on February 14, 1990.

The court held an evidentiary hearing on April 9, 1990 on this case. The District Court found that the issues contained in the paragraph reproduced on page 3 from the Defendants' written settlement were never discussed before the court and were, therefore, not a part of the agreement which the parties consummated on October 25, 1989 and ordered it to be stricken from the settlement agreement written draft that the Defendants had submitted to Plaintiff for his signature on November 3, 1989, but confirmed the settlement agreement containing the other remaining terms by opinion and order filed on April 12, 1990. The District Court also ordered the Plaintiff to reimburse the Defendants' sum of $1055.00 for attorneys' fees by order filed on May 31, 1990.

Appeals and cross appeals were filed in May/June, 1990. The United States Court of Appeals affirmed the District Court judgement on April 16, 1991. The petitioner's petition for rehearing was denied on May 17, 1991. The Appellate Court also affirmed the District Court judgement regarding Defendants' cross

appeal. The decision was reported in a published opinion.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Decisions Of The Court Of Appeals And The District Court Are In Direct Conflict With Rule 52 Of The Federal Rules Of Civil Procedure And So Far Depart From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.

The Court of Appeals' decision and the District Courts' decision are in direct conflict with Rule 52 of the Federal Rules of Civil Procedure. Rule 52(a) contains a clear and unambiguous statement that findings of fact must be set aside if they are determined to be clearly erroneous; a finding must be set aside if it is against the clear weight of the evidence. *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Grubb v. W.A. Fotte Memorial Hospital, Inc.*, 741 F.2d 1486, 1494 (6th Cir. 1984); *vacated on rehearing on other grounds*, 759 F.2d 546 (6th Cir. 1985); *cert. denied* 474 U.S., _____, 88 L.Ed.2s 284, 106 S.Ct. 342 (1985).

The findings of the District Court that on October 25, 1989, the parties to this action entered into a

settlement agreement that resolved all issues in this case is contrary to the facts because a second settlement conference was held on January 3, 1990, with the intention to resolve issues and to finalize the agreement reached earlier.

The findings of the District Court that the Plaintiff refused to sign the agreement and subsequently failed to abide by the terms of the agreement reached on October 25, 1989, is groundless based on the following: Plaintiff did not refuse to sign any *valid* agreement. The Court of Appeals had acknowledged that the Plaintiff's refusal to sign the memorialized settlement agreement arguably was not made in subjective bad faith given the District Court's findings that the Defendants included a new term not agreed to in it. The court had ignored the written evidence that the Defendants (in their February 7, 1990 letter to Plaintiff, written a week before their petition to confirm the settlement agreement) had made it very clear in unequivocal terms that they would not accept anything short of Plaintiff"s signature on their written draft containing the not agreed to term.

The findings by the Court of Appeals that Plaintiff's attorney withdrew only when Plaintiff refused to sign the settlement agreement is in conflict with attorney's own statement. Court of Appeals has overlooked his statement as follows: " My client is unwilling to sign the settlement papers forwarded with the language indicating that he cannot reapply. This was not discussed nor made a part of our agreement anytime." This was stated in his letter of December 15, 1989 in response to Defendants' absolute insistence

that a no reapplication provision must be included in the agreement.

The findings by the Court of Appeals that the record does not indicate that Mr. Dhaliwal simply sought removal of the offensive term and agreed to the terms of the settlement except the disputed provision are irrelevant as the parties could not have consummated the agreement anyhow due to the Defendants' refusal to drop out the not agreed to term from the written draft. The court had ignored the fact that Plaintiff met his burden after his attorney sent a letter on December 15, 1989 to the Defendants informing them that their written draft contained a new material term that was not discussed nor was it made a part of the agreement at any time. The court had also overlooked the February 3, 1990 letter from Plaintiff to Defendants indicating his intentions to settle the case out of the court. The court had also ignored the fact that Defendants declined that offer. Furthermore, the court did not ask any questions relating to these issues.

The finding by the Appellate Court that Plaintiff used the disputed provision in an effort to avoid enforcement of the entire settlement is confusing. The petitioner gave the following five reasons in support of his argument that an enforceable settlement agreement was not reached , but the Appellate Court had failed to review them. They are: (1) Defendants' inclusion of the new material terms in the written expression of the oral settlement repudiates the oral agreement. *Taylor vs. Gordon Flesch Co.* 793 F.2d 858, 864 (7th cir. 1986); (2) Defendants unreasonable interpretation repudiated the oral agreement. *Taylor* at 862; (3) The written draft presented did not contain all the terms of the contract.

Taylor at 862; (4) Evidence shows that the second and final conference was held to finalize the agreement; (5) Defendants' insistence on including a new term that was not explicitly discussed shows intent not to conform.

The findings of the Appellate Court that the Plaintiff reflected on the oral agreement and felt he was entitled to a greater sum of money are irrelevant because the parties could not consummate the oral agreement from October 25, 1989 to January 3, 1990 for a period of 70 days even though Plaintiff had not asked for more money during this period. Plaintiff's demand for more money cannot be the reason for the dispute. Thus, the main cause of the dispute was the Defendants' insistence to add new material terms profitable to them and agrees with the District Court finding (A-20). Plaintiff made demand for more money 70 days after the Defendants insisted on the inclusion of a new term. It was a part of the negotiations that took place at the second settlement conference arranged by the Defendants. The agreement could not have been consummated anyhow even if the Plaintiff had not asked for more money because the Defendants stuck firmly to their demand for including a new term in the final agreement.

The District Court completely ignored the evidence. The District Court also ignored the proceedings of the second settlement conference that was arranged by the Defendants for the purpose of adding new material terms into the agreement. The Appellate Court's standard that "in order to repudiate a contract, a party must unequivocally declare its intent not to perform," is rather puzzling because it seems to justify the Defendants' actions of including a not agreed-to

term. Moreover, it appears to condone their efforts to make it a part of the agreement. The above standard appears to encourage the parties to add or subtract several new terms without reneging the contract. The Appellate Court's logic that Plaintiff should pay attorney's fees to Defendants on the basis that the record does not show he tried to remove the offensive term is astonishing in light of the written evidence that Defendants had not only "insisted" to add a new material term, but had even refused to hold a meeting to resolve the dispute. The Court of Appeals' review of facts and events does not seem to follow any logical pattern. The Court of Appeal's failure to apply Rule 52 to this case constitutes a gross departure from the accepted course of judicial proceedings and calls for an exercise of this Court's power of supervision.

II. The Decision of Appellate And District Courts Are Not Easily Comprehensible In Terms Of Common Logic.

The District Court had found that Plaintiff noticed an objectionable matter in the Defendants' written memorialization, and related this to his attorney, who in turn informed the Defendants that the objectionable matter was never discussed and was unacceptable to his client.

> The parties were thus unable to consummate the settlement and Plaintiff, upon oral motion of his attorney, was granted leave to reinstate the case on January 3, 1990 (A-20).

Thus, conflict arose between the parties over the terms of the contract. Defendants would not accept the contract without the new term and the Plaintiff would not accept the agreement including the new term; the parties reached a dead end. A second settlement conference was held to resolve the dispute. Defendants' absolute insistence on including a not agreed-to term was the main reason the parties could not consummate the agreement from October 25, 1989, to January 3, 1990 because Plaintiff had not asked for more money during this period. At the second settlement conference the Defendants stood firm to add the new term in the agreement and Plaintiff placed his demand for more money. After the evidentiary hearing the District Court had found that the objectionable term was not a part of the agreement reached on October 25, 1989.

The Defendants' insistence to include a new term was clearly 61 days before the Plaintiff placed his demand for higher compensation. The Defendants also rejected the Plaintiff's February 3, 1990, good faith proposal to settle the case out of the court, a week before they filed their petition to confirm the settlement agreement containing new material terms. Plaintiff's demand for more money is immaterial as the agreement reached on October 25, 1989, could not have been consummated anyhow even if the Plaintiff had not asked for higher compensation due to Defendants' unequivocal declaration in their letter of February 7, 1990, that they will not execute any other agreement except the one containing the not agreed to no reapplication term because the Defendant's insistence

on including this not agreed to term was the main reason for the dispute.

The act of the District Court in declaring the Plaintiff's demand of higher compensation as an abrogation of the agreement is incomprehensible. What in effect constitutes an abrogation of the agreement is the Defendants' actions of circumventing the terms of the agreement by adding arbitrarily new material terms, refusing to resolve them at the second settlement conference and then petitioning the court to confirm them as a part of the agreement. If the Plaintiff's request to change the compensation term reneges the contract then the Defendants' prior attempt to add a new term should also renege it especially in a situation where they had lost in court on this issue. Thus, the Defendants, ***not the Plaintiff***, had reneged the contract and are liable for subsequent court appearances.

III. The Decision Of The Appellate Court Is In Direct Conflict With Its Decision In *Taylor v. Gordon Flesch Co., Inc.* 793 F.2d 858, 864 (7th Circuit 1986).

The posture of the present case is virtually identical to Taylor 793 F.2d 858. In Taylor, the Plaintiff refused to sign the Defendant's written draft because he thought that the Defendants added new material terms in their written draft. In this case, the Plaintiff refused to sign because he knew that the Defendants had included a not agreed-to term in the written draft of the oral

agreement. In Taylor, the court compared the drafts prepared by the Plaintiff's and Defendants' attorneys to find out that the Defendants had not altered material terms and whether the alternative settlement language proposed by the Defendant amounted to the repudiation of the oral agreement. In this case, the court did find a new material term in the Defendant's written draft.

Under Taylor 793 F.2d 858, 862 the offer in order to be legally operative and to create a power of acceptance must contain all the terms of the contract to be made. These terms must be reasonably certain and reasonably ascertainable from the acts and words of the parties. The agreement reached on October 25, 1989 did not contain all the terms of the contract because both parties agreed to a second settlement conference on January 3, 1990 to finalize the agreement. Defendants' interpretation that no reapplication provision is implicit in the no reinstatement term is unreasonable as the dictionary meaning of the two words are far apart. They never revealed their interpretation for a period of 166 days from October 25, 1989 to April 9,1990. The actions of the Defendants and the course of the events point out that the Defendants fabricated the phrase at the evidentiary hearing.

Defendants decided to add this new term and made it very clear in their letter of November 3, 1989 that they are "absolutely insistent" on its inclusion and it "must be included" in the agreement. They emphasized that they "will have paid $12,000 for nothing" without this clause and did not pay any money. They also tried to justify it on the basis that this provision is standard in employment discrimination cases.

Defendants admit that the no reapplication clause was not discussed explicitly. They ignored the basic requirements of a contractual relationship that a settlement agreement is a limitation on the rights of the parties , any such limitation must be agreed to by the parties for that term to be an enforceable part of an agreement. The Defendants made no effort to explain their understanding of the no-reinstatement provision to the Plaintiff after his attorney informed them in writing that this provision was not acceptable because it was not discussed and it was not made a part of the agreement anytime.

Defendants scheduled the second settlement conference with the court to resolve this dispute, but did not disclose their interpretation. Instead, they stood firm to make this term a part of the agreement. After this, they met Plaintiff twice in court at the status hearings but maintained their silence. They turned down the Plaintiff's proposal to settle the case out of court and even refused to hold another meeting to discuss the issues. They never used the actual word "implicit" either in the correspondence with the Plaintiff or in any of their petitions and motions to the district court.

In reality, Defendants knew all along that this objectionable term was not a part of the agreement. If it had been their real understanding from the beginning, there would have been no need for them to insist on including a new term which is already a part of the agreement. If they really knew this term was a part of the agreement, then why did they insist on it? They should

have sent their written memorialization alone, waited for the Plaintiff's response, and then disclosed their understanding of the terms. Here, they "insisted" that the no reapplication provision "must" be included even before the Plaintiff had seen their written draft.

The Defendants maintained their silence before and at the second settlement conference because they had asked Plaintiff's attorney to obtain Plaintiff's acceptance right after the first settlement conference. They fabricated the implied relationship theory at the evidentiary hearing more than three months after the Plaintiff's counsel withdrew from the case. Their November 3, 1989 letter is in response to Plaintiff's refusal to their belated demand to make the new term a part of the earlier agreement. This is why they "insisted" that this term "must" be included and emphasized that without this term, they "will have paid $12,000 for nothing" and actually did not pay anything. Their intention not to execute the agreement without the new term is very clear. Otherwise, they would have either revealed their alleged understanding of the term or replaced this term with the original agreed to term after the Plaintiff's attorney made it clear to them that the term was not discussed nor made a part of the agreement at any time.

Though the Defendants did not unequivocally declare their intent not to perform, they made it abundantly clear in unambiguous terms in writing that the no reapplication provision "must" be included and that they will not execute any other agreement, except the one containing new material terms, which they originally presented for Plaintiff's signature. Later, they filed their petition to confirm this invalid agreement.

IV. The Decisions Of The Court Of Appeals And The District Court Defy Logic And Reasoning.

The Court of Appeals had agreed with the District Court's findings that the Defendants included a material term not agreed to in its written memorialization of the oral agreement. The document presented to Plaintiff's signature was not a valid agreement because the District Court ordered the new material term to be stricken from it. The Appellate Court's other reasons for affirming the attorney's fee award are irrelevant because of a unresolved prior dispute over the Defendants' inclusion of a not agreed-to term in their written memorialization and in light of the fact that the court had found that the disputed term was not a part of any agreement and Defendants had lost in the court on the disputed issues. Plaintiff did not violate any law by refusing to sign an illegal document and cannot be held liable for Defendants' attorneys' fees for subsequent court appearances.

Appellate Court had noted that normally each party must bear their own attorney's fees absent a showing of oppression or subjective bad faith (A-9). *TMF Tool Co., Inc. v. Sielbengartmer* 899 F.2d 584, 590 (7th Circuit 1990). In this case it was determined that Plaintiff's refusal was not made in subjective bad faith. The Appellate Court's affirmation of the attorneys' fees award is in conflict with its own findings.

The Court of Appeals had ignored the Federal Rule of Appellate Procedure 39 in taxing the Cross-Appellee for the Cross-Appellants' cost for clerk's fees for filing Notice of Cross Appeal. Cross-Appellants had

paid this fee to get the judgment altered but had lost in the court on this isue. They are not entitled to this cost because they are not the prevailing party.

V. The Decision Of The District Court To Grant The Oral Motion Of The Counsel Seems To Be Illogical.

The Appellate Court's finding that the counsel withdrew only when Mr. Dhaliwal refused to sign the settlement agreement is utter fabrication. Attorney Reese never submitted any valid contract for Plaintiff's signature. The District Court's findings that Mr. Reese's motion for withdrawal was predicated on the disagreement he was having with his client regarding reneging on the settlement agreement is irrelevant due to an unresolved prior dispute over the terms of the agreement between the parties and in light of the fact that Mr. Reese had testified in the court and wrote a letter to Defendants that the objectionable term was not discussed nor made a part of an agreement any time. Oral motion of Attorney Reese to withdraw was granted in the absence of the Plaintiff and the Plaintiff did not get an opportunity to rebut the charges.

As per Circuit Rule 51 (A), the court notifies the client and gives him an opportunity to respond when his court-appointed counsel files a motion to withdraw because he believes that the case is frivolous. On this basis, it would be illogical if a client who has paid his attorney $7,741.12 does not get an opportunity to respond to his attorney's motion to withdraw.

VI. The Decision Of The District Court Looks Arbitrary.

The District Court has the discretionary power to appoint counsel under 42 U.S.C. § 2000 5(f)(1) in a civil rights case. Plaintiff submitted to the District Court that his case is very strong, he is unable to retain private counsel, he is financially able to pay the court-appointed attorney's fees and offered to do so. The appointment would not have caused any financial burden on the court's annual budget and may have saved valuable judicial time. This case should have been decided at the District Court level had a skilled attorney represented the Plaintiff at the evidentiary hearing.

CONCLUSION

For these reasons, a writ of certiorari should be issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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PRO-SE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be mailed, with proper postage prepaid, to:

Henry J. Close
John Reardon, Jr.
CONNOLLY, OLIVER, CLOSE & WORDEN
P.O. Box 4749
Suite 300, 124 No. Water Street
Rockford, Illinois 61110-4749

two copies of the foregoing petition for writ of certiorari.

Dhaliwal 7-31-91

Jugraj Singh Dhaliwal
740 G Street
Los Banos, California 93635

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUGRAJ SINGH DHALIWAL,
Plaintiff-Appellant,

v.

WOODS DIVISION, HESSTON CORPORATION, a Kansas Corporation, authorized to do business in Illinois, and DAVID SCHIRER and MICHAEL DAWSON, Individual Agents of Hesston,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Illinois, Western Division

Decided and Filed May 17, 1991

Before: POSNER, FLAUM, and KANNE, Circuit Judges

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Nos. 90-2212, 90-2259, 90-2357

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUGRAJ SINGH DHALIWAL,
Plaintiff-Appellant/
Cross-Appellee,

v.

WOODS DIVISION, HESSTON CORPORATION, a Kansas Corporation, authorized to do business in Illinois, and DAVID SCHIRER and MICHAEL DAWSON, Individual Agents of Hesston,
Defendants-Appellees/
Cross-Appellants.

ON APPEAL from the United States District Court for the Northern District of Illinois, Western Division

Decided and Filed April 16, 1991

Before: POSNER, FLAUM, and KANNE, Circuit Judges

ORDER

The plaintiff, Mr. Dhaliwal, in this employment discrimination case objects to the district court's finding that he agreed to a settlement and to its order directing him to pay the defendants' attorney's fees for a portion of the litigation and the district court's refusal to appoint counsel after his retained counsel withdrew. The defendants' objection to the district court's refusal to include a provision in the confirmed settlement agreement that prohibits Mr. Dhaliwal from reapplying for future employment with them is addressed in a published opinion issued in conjunction with this order.

FINDINGS OF FACT

In 1986 Mr. Dhaliwal filed a suit charging that the defendants discriminated against him based on his national origin and alien status in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.[1] On October 25, 1989, the district court conducted a settlement conference in this case. At that conference,

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[1]Mr. Dhaliwal's original petition contained other charges of discrimination. However, due to his failure to file a timely complaint with the E.E.O.C., the district court goranted summary judgment tothe defendants on those charges. Mr. Dhaliwal does not appeal that decision therefore not before this court.

the defendants agreed to pay Mr. Dhaliwal $12,000. Mr. Dhaliwal agreed not to seek reinstatement. The district court then dismissed the case with prejudice and with leave to reinstate within 60 days.

On November 3, 1989, as a result of that conference, the defendants forwarded a written recitation of its understanding of the settlement agreement reached during the conference to Mr. Dhaliwal. The document included a provision that he agree not to seek future employment with the defendants. Mr. Dhaliwal refused to sign the document, believing that the prohibition against seeking future employment was a material term not agreed to at the settlement conference. In addition, Mr. Dhaliwal contended that by their actions the defendants allowed for negotiation of the entire settlement and not just discussion of the provision at issue (R.71). The defendants responded by arguing that the provision was an implicit component of the parties' agreement that Mr. Dhaliwal would not seek reinstatement.

Further negotiations ensued, including several more court appearances. A second settlement conference was held on January 3, 1990. The defendants subsequently petitioned to confirm the settlement agreement of October 25, 1989 and for attorney's fees incurred as a result of Mr. Dhaliwal's refusal to sign the written recitation of the October 25, 1989 settlement agreement.

After an evidentiary hearing, the district court confirmed the settlement agreement as memorialized by

the defendants but excluded the provision prohibiting Mr. Dhaliwal from seeking future employment with the defendants. (R.74). In making this decision, the district court found that Mr. Dhaliwal knowingly and voluntarily agreed to the October 25, 1989 settlement offer. (R.74 p.7). Further, the district court explained:

> because a settlement agreement is a limitation on the rights of the parties, any such limitation must be discussed and agreed to by the parties for that term to be an enforceable part of that agreement....Because the Court further finds that the [provision prohibiting Mr. Dhaliwal from seeking future employment] was not included in the discussion or the oral settlement agreement, this Court orders that [that provision] be stricken from the confirmed settlement order.... (R.74 p.9-10).

The district court also granted the defendants' motion for attorney's fees for their costs incurred in seeking enforcement of the October 25, 1989 settlement agreement. (R.84). The district court denied Mr. Dhaliwal's subsequent motion to vacate the judgement.

ANALYSIS

A. The Confirmed Settlement Agreement

Oral settlement agreements are enforceable in Title VIII actions when the plaintiff knowingly and voluntarily agrees to the terms of such an agreement. *Glass v. Rock Island Refining Corp.*, 788 F.2d 450, 454 (7th Cir. 1986); *Taylor v. Gordon Flesch Co., Inc.*, 793 F.2d 858, 862 (7th Cir. 1986). Whether a plaintiff

knowingly and voluntarily agrees to a settlement is a question of fact. We review a district court's factual findings in Title VII cases under a clearly erroneous standard. *Glass*, 788 F.2d at 455; *Chesser v. Illinois*, 895 F.2d 330 (7th. Cir 1990). Thus, where there are two permissible views of the evidence, the factfinder's choice between them can not be clearly erroneous and we will not disturb the factfinder's decision. *Glass* 788 F.2d at 455, quoting *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

Here, we can not conclude that the district court erred in enforcing the oral agreement without the provision prohibiting Mr. Dhaliwal from reapplying for employment with the defendants. The district court based its conclusion that Mr. Dhaliwal knowingly and voluntarily agreed to an oral settlement on the fact that he was present and that he orally accepted the terms of the settlement on October 25, 1989. After an evidentiary hearing, the district court found that the oral agreement included: 1) a $12,000 cash payment to Mr. Dhaliwal, 2) no admission of liability on the part of the defendants, and 3) an agreement that Mr. Dhaliwal would not seek reinstatement. (R.74 p.4). Finally, the district court found that at no time during the settlement conference was the issue of Mr. Dhaliwal's ability to reapply for employment with the defendants discussed. (R.74 pp.5,8).

We note that in order to be legally operative, an offer must include all the terms of the contract to be made. *Taylor,* 793 F.2d at 862. However, we have held that an oral contract in enforceable even when a party is forced to protect the agreement by proving the existence of the terms of the oral agreement and although such

proof may be difficult to make. *Id.* Thus, although the parties were put in the difficult position of proving the terms of their oral agreement, we can not conclude that the district court erred in enforcing the agreement reached on October 25, 1989. The court presided at the conference and its finding that Mr. Dhaliwal was present at the negotiations and agreed to an oral settlement offers support the conclusion that his acceptance was knowing and voluntary.

Although Mr. Dhaliwal contends that by including the provision prohibiting his future application for employment the defendants repudiated any oral contract that was formed on October 25, 1989, this argument is contrary to the facts. In order to repudiate a contract, a party must unequivocally declare its intent not to perform. *Taylor,* 793 F.2d at 864. At no time did the defendants unequivocally declare their intention not to abide by the settlement agreement. In fact, it was Mr. Dhaliwal who refused to sign the written recitation of the agreement. Further, Mr. Dhaliwal undermines his argument by also challenging the district court's order based on his own conclusion that upon reflection, he was entitled to a greater sum of money than that included in the confirmed settlement agreement. (Appellant's Brief p.7). A party may not be excused from honoring a settlement agreement simply because he later decides the settlement was insufficient. *Glass*, 788F.2d at 454. Further, the record does not indicate that Mr. Dhaliwal agreed to the terms of the settlement except for the disputed provision. Rather, it appears that he used the disputed provision in an effort to avoid enforcement of the entire settlement.

B. The Attorney's Fee Award

We review a district court's decision on an award of attorney's fees for an abuse of discretion. *TMF Tool Co., Inc. v. Siebengartner*, 899 F.2d 584, 590 (7th Cir. 1990). We note that normally each party must bear their own attorney's fees absent a showing of oppression or subjective bad faith. Id. at 59. See also *Unity Ventures v. County of Lake*, 894 F.2d 250, 253 (7th Cir. 1990). Because the district court found that Mr. Dhaliwal agreed to a settlement on October 25, 1989, we cannot conclude that it abused its discretion in ordering Mr. Dhaliwal to pay the defendants' attorney's fees for confirming the settlement agreement.

Mr. Dhaliwal's refusal to sign the memorialized settlement agreement arguably was not made in subjective bad faith, given the district court's finding that the defendants included a term not agreed-to in its written memorialization of the agreement. However, the record does not indicate that Mr. Dhaliwal simply sought removal of the offensive term. Rather, it appears that he sought to escape from the entire agreement as a result of the inclusion of this term. In light of this fact and Mr. Dhaliwal's contention that he was entitled to a greater sum of money than contained in the settlement, the district court did not abuse its discretion by awarding attorney's fees to the defendants.[2]

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[2] Mr. Dhaliwal also objects to the district court's decision not to appoint counsel and to allow his privately retained counsel to withdraw. There exists no right to appointed counsel in civil matters.

Nos. 90-2212, 90-2259, 90-2357

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUGRAJ SINGH DHALIWAL,
Plaintiff-Appellant/
Cross-Appelle,

v.

WOODS DIVISION, HESSTON CORPORATION, a Kansas Corporation, authorized to do business in Illinois, and DAVID SCHIRER and MICHAEL DAWSON, Individual Agents of Hesston,
Defendants-Appellees/
Cross-Appellants.

ON APPEAL from the United States District Court
for the Northern District of Illinois, Western Division

Decided and Filed April 16, 1991

Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990). Thus, we find no error in the district court's refusal to appoint counsel particularly in light of the fact that Mr. Dhaliwal's counsel withdrew only when Dhaliwal refused to sign the settlement agreement. Our conclusion is buttressed by the fact that Mr. Dhaliwal possessed the resources to obtain substitute counsel but was unable to find counsel willing to take the case.

Before: POSNER, FLAUM, and KANNE,
Circuit Judges

Before POSNER, FLAUM, and KANNE, *Circuit Judges.*

POSNER, Circuit Judge. This case began as a suit by Mr. Dhaliwal against his former employer, charging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000. In a conference with the district judge, the parties discussed settlement and came to an oral agreement to settle the case: concretely, the plaintiff agreed to dismiss the suit and not seek reinstatement in his job, and the defendants agreed to pay him $12,000. The defendants prepared a written memorial of the agreement and asked the plaintiff to sign it. He refused on the ground that the written agreement included a provision that he not seek future employment with the defendants, a matter that had not been discussed at the settlement conference. The defendants asked the judge to enforce the settlement, and he entered an order directing the parties to comply with all the terms of the written agreement except the one relating to future employment, which he agreed had not been discussed at the settlement conference. Nevertheless, he ordered the plaintiff to pay the attorney's fees that the defendants had incurred in obtaining enforcement of the oral agreement, on the ground that the plaintiff had tried to renege on the agreement in its entirety. The plaintiff appeals from the award of attorney's fees and also from the judge's refusal to vacate his judgement enforcing the settlement agreement. The defendants cross-appeal from the judge's order striking the future-employment

provision from their redaction of the settlement agreement.

The plaintiff's appeals raise no general questions and we are affirming them by unpublished order today. The cross-appeal, however, raises a question of some novelty and importance. The defendants acknowledge that the issue of future employment was not discussed at the settlement conference, but they argue that it is implicit in an agreement not to seek reinstatement in the job from which the plaintiff was (allegedly improperly) fired that he will not apply for any other job with this employer in the future. We have found no cases on this question, although we have some slight reason to believe that settlement agreements in Title VII cases in which reinstatement is not contemplated usually contain both provisions--no reinstatement and no future job application. *Kuykendall v. Rockwell International Corp.*, 27 FEP Cases 805, 807 (C.D. Cal. 1979); Barbara Lindemann Schlei & Paul Grossman, *Employment Discrimination Law* 1526 (1988). The argument that the first implies the second and hence that the second need not be stated separately is that an agreement not to seek reinstatement would be nugatory if the plaintiff were free to apply for a job with the same employer "in the future"; for the future begins tomorrow, and the job could be the same one the plaintiff had just lost.

We disagree. "Reinstatement" means putting the plaintiff back in his old job at the conclusion of the lawsuit. If the settlement agreement contains a no-reinstatement clause but no no-future-employment clause and the day after the agreement is signed the plaintiff applies for his old job and is turned down, the

court interpreting the agreement may find that he is seeking reinstatement and therefore should not be heard to complain about being turned down: he waived the right to complain, in the settlement agreement. We say the judge "may," not that he "must," so conclude, because it could be argued that so long as the employee is seeking merely the same consideration as other applicants, and not automatic reinstatement to his own job, he really is applying for future employment, not for reinstatement. However, this may be, it would be clear that if after some decent lapse of time the plaintiff applied for a different job with the same employer-perhaps it is a vast multinational corporation, and the job he is applying for is in an office ten thousand miles away from the office in which he was working when he was fired--he would not be applying for "reinstatement." If the employer wants to preclude the possibility, it should negotiate for a separate provision in the settlement agreement. The first case, in contrast, is within a fuzzy area in which an employment application could be characterized as either an application for reinstatement or an application for a new job. But the employer can eliminate the fuzzy area as well by negotiating for separate provisions, rather than relying solely on the no-reinstatement clause to keep the former employee out of its hair.

We have treated the issue as one of general contractual interpretation because the parties have done so. We reiterate earlier expressed doubts that Title VII settlement agreements are in fact covered by general law--federal common law--rather than by state contract law. *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 474-76 (7th Cir. 1986); *Riley v. American Family Mutual Ins. Co.*, 881 F.2d 368, 371-73 (7th Cir. 1989).

AFFIRMED

Clerk for the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JUGRAJ SINGH DHALIWAL,
Plaintiff,

v.

WOODS DIVISION, HESSTON CORPORATION, a Kansas Corporation authorized to do business in the State of Illinois,
Defendant.

Case No. 86 C 20375

Filed April 12, 1990

MEMORANDUM OPINION AND ORDER

This action comes before the Court on defendant's petition to confirm the settlement agreement and dismiss the case with prejudice. For the reasons set forth in the opinion below, this Court grants defendant's petition to confirm the settlement agreement as modified by this Court and dismisses the case with prejudice.

BACKGROUND

This action was filed by the plaintiff, Jugraj Singh Dhaliwal, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e alleging retaliatory discharge, unwarranted disciplinary charges, denial of leave and creation of a hostile work environment. However, plaintiff failed to file timely charges with the E.E.O.C. For that and other reasons enumerated in a Memorandum Opinion and Order issued by this Court on July 10, 1989, partial summary judgement was granted in favor of defendant on the issues of retaliatory discharge, disciplinary charges and denial of leave.

Following disposition of defendant's partial summary judgement motion, only plaintiff's hostile work environment allegation remained before the Court.

On October 25, 1989, the parties held a pre-trial settlement conference with the Court in order to explore and facilitate settlement in this matter. At that settlement conference, plaintiff and defendant orally agreed to settle the matter for a payment of $12,000 in cash. The Court dismissed the case without prejudice and with leave to reinstate within sixty days. The basic contents of the settlement conference were memorialized in a Pretrial Conference Memorandum and a Pretrial Order dated October 25, 1989, and docketed October 26, 1989. (Docket Entry ## 57 & 58).

On November 30, 1989, plaintiff filed a motion for appointment of counsel although plaintiff's previous counsel, Attorney Brian Reese, was still the attorney of

record. Subsequently, on December 14, 1989, plaintiff moved for an extension of time within which to reinstate the case. Then, on January 3, 1990, plaintiff's attorney orally moved to reinstate the case, which motion was granted; further, Attorney Brian Reese moved to withdraw as attorney in the case, which motion was also granted by this Court. Mr. Reese represented that his motion for withdrawal was predicated on his belief that the settlement was just and fair and the disagreements he was having with his client regarding reneging on the settlement agreement. Evidently Mr. Reese's client reflected on the oral agreement and felt he was entitled to a greater sum of money. Mr. Dhaliwal has since stated to the Court that he felt his attorney did not understand how much money this case was actually worth.

At the January 3, 1990 status-hearing, plaintiff was given 21 days from entry of the order, until January 25, 1990, to obtain new counsel. On January 29, 1990, plaintiff renewed his motion for appointment of counsel. Plaintiff has and continues to represent that he is able to afford privately retained counsel, but further represents that no attorneys are interested in taking his case. At the next status hearing, on January 31, 1990, plaintiff again stated that he had been unable to retain private counsel to date and would like an additional extension in order to attempt to retain counsel. Plaintiff was granted an additional two-week extension through February 14, 1990.

On February 2, 1990, this Court entered an Order denying plaintiff's motion for appointment of counsel

citing that plaintiff is currently employed and has the financial resources to hire or otherwise obtain or retain private counsel. On February 14, 1990, plaintiff appeared before this Court without counsel explaining that he had still been unable to retain an attorney in this case. Defendant now tenders the instant motion to confirm the previous settlement agreement and dismiss the case with prejudice.

FINDINGS OF FACT

The Court, having held an evidentiary hearing on this matter on April 9, 1990, makes the following findings of facts.

On October 25, 1989, the parties appeared before this Court for a pre-trial conference for the express purpose of discussing settlement. At that conference the plaintiff was represented by Attorney Brian Reese and the defendant was represented by Attorneys Henry Close and Diane Klock.

During the course of the settlement negotiations, Attorney Reese had occasion to bring an offer to his client for consideration. That offer included, *inter alia*, a $12,000 cash payment, no admission of liability on the part of the defendant, and no reinstatement for the plaintiff. In the course of communicating the offer, Attorney Reese advised the plaintiff that it was his professional opinion that it was in plaintiff's best interest to accept the settlement offer. Some discussions ensued between the plaintiff and Attorney Reese apparently relating to the advisability of accepting the settlement offer and Attorney Reese's continued

representation of plaintiff in this lawsuit.[1] In the course of this conversation between Attorney Reese and the plaintiff, plaintiff authorized Attorney Reese to settle the case under the terms outlined in that conversation (i.e., *inter alia* no reinstatement, no admission of liability, $12,000 cash payment)

The parties met with the Court once more on October 25, 1989, and the foundation for a settlement was agreed to in the presence of this Court. During the settlement negotiations with the Court, no discussion was initiated or conducted by the defendant or the plaintiff relating to plaintiff's ability to reapply for a position with the defendant corporation. However, discussions were conducted relating to reinstatement of the plaintiff and reinstatement was not part of the settlement offer. Following the settlement conference, the case was dismissed without prejudice and with leave to reinstate within sixty days.

Sometime following the settlement conference with the Court, defendant drew up a draft settlement proposal for plaintiff's review and signature. During

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[1] There is some dispute as to what exactly was said during this conversation. Attorney Reese's testimony suggests that during the course of this conversation, Mr. Dhaliwal asked Attorney Reese about continued representation and there was some general discussion about an hourly fee representation, what that hourly fee might be, and some general prediction as to what the total cost for the representation might be. Mr. Dhaliwal's testimony, as well as his cross-examination of Attorney Reese, suggests that the conversation may have included Attorney Reese telling Mr. Dhaliwal that if he did not agree with the settlement offer, Attorney Reese would discontinue his representation of Mr. Dhaliwal in this lawsuit. In either event, the exact content this conversation has no real bearing on the outcome of this motion.

plaintiff's examination of the document, he noticed a paragraph in the draft proposal which read as follows:

> Plaintiff agrees that he will not apply for employment with Defendant or any of Defendant's Related Parties at any location and hereby waives any rights he may have to apply to such employment, unless Defendant specifically agrees in writing to waive its rights under this paragraph.

(Def. Exhibit 2 at 2). Upon reading this paragraph, the plaintiff contacted Attorney Reese and related to him that this matter was never discussed at the settlement conference and was unacceptable to him. Attorney Reese conveyed plaintiff's problem with this paragraph to defendant's attorneys by letter.

The parties were thus unable to consummate the settlement and plaintiff, upon oral motion of this attorney, was granted leave to reinstate the case on January 3, 1990.

DISCUSSION

It is settled that a plaintiff "may waive his cause of action under Title VII as part of a voluntary settlement." *Alexander v. Garner-Denver Co.,* 415 U.S. 36,52,94 S. Ct. 1011, 1021, 39 L. Ed. 2d 147 (1974). The Supreme Court continued stating that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." Id. at 52 n.15, 94 S. Ct. at 1021 n.15.

Another question arises as to whether or not an oral settlement agreement can be enforced. In *Fulhence v. J. Ray McDermott & Co.,* 662 F.2d 1207 (5th Cir. 1981), the court stated that "[f]ederal law does not . . . that the settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute." Id. at 1209. See also *Lyles v. Commercial Lovelace Motor Freight, Inc.*, 684 F.2d 501, 504 (7th Cir. 1982).

The Seventh Circuit has stated quite clearly that "[a] party to a settlement cannot avoid agreement merely "If a party to a Title VII suit who has previously authorized a settlement changes his mind . . ., that party remains bound by the terms of the agreement." *Glass v. Rock Island Refining Corp.*, 788 F.2d 450 (7th Cir. 1986) quoting *Worthy v. McKesson Corp.*, 756 F.2d 1370, 1373 (8th Cir. 1985) (quoting *Fulgence*, 662 F.2d at 1209).

The determination of whether a plaintiff has knowingly and voluntarily agreed to settle his Title VII claim is a question of fact. *Glass,* 788 F.2d at 455.

Based on the findings of facts made by this Court above, this Court holds that both plaintiff and defendant did knowingly and voluntarily agree to the settlement offer made at the October 25, 1989 pre-trial conference with this Court. At the April 9, 1990 evidentiary hearing, plaintiff attempted to elicit testimony of Attorney Reese to

the effect that Mr. Reese threatened to withdraw from the case if plaintiff did not accept the settlement offer. Mr. Reese denies that he made such a statement. However assuming arguendo, that Attorney Reese did make such a statement, that statement does not, without more, constitute duress sufficient to negate the formation of an oral agreement. It very well may have been Attorney Reese's professional opinion that the settlement offer was fair, that plaintiff's case was not a strong one, that plaintiff was unlikely to get a verdict for more than that offer, and that the situation did not merit continuing on with the case. This is not an uncommon circumstance for a plaintiff's lawyer to find him or herself in, and plaintiff's attorney's frank discussion with the plaintiff cannot be construed as constituting duress sufficient to negate the formation of an oral agreement to settle this lawsuit. Therefore, plaintiff's contention that he never voluntarily agreed to settle the case is without merit.

Plaintiff's second contention in response to defendant's motion to confirm the settlement is that the written proposal contained material terms which were not discussed during the pre-trial conference with the Court. As stated above, this Court finds that the issues contained in the above quoted paragraph from page 2 of the proposed settlement agreement (Defendant's Exhibit 2) were never discussed before the Court and were, therefore, not a part of the agreement which the parties consummated on October 25, 1989.

As this Court discussed above, this Court does have the discretionary power to enforce an oral settlement agreement. However, this Court has the power to enforce the agreement which was reached

between the parties. In this case, the agreement reached between the parties on October 25, 1989 did not contain any provisions limiting plaintiff's ability to reapply for employment with the defendant corporation. Defendant suggests, through the testimony of Attorney Klock and Mr. Vanman of the Woods Division, Hesston Corporation, that it was implicit in the discussion of reinstatement that there would be no potential for any future relationship between the parties. However, in response to a question from the Court, Attorney Klock specifically agreed that the question of reapplication had never been discussed at the October 25, 1989 pre-trial conference with this Court. Therefore, because a settlement agreement is a limitation on the rights of the parties, any such limitation must be discussed and agreed to by the parties for that term to be an enforceable part of that agreement. This requirement is basic to any contractual relationship, of which this settlement agreement is one.

Therefore, this Court holds (1) that the oral settlement agreement between the parties to this lawsuit was knowingly and voluntarily entered into by both parties; (2) that the oral agreement is enforceable as against both parties to the agreement; and (3) the Court orders the settlement agreement confirmed as hereafter modified by this Court.

Because the Court further finds that the above-quoted paragraph from page 2 of the proposed settlement agreement was not included in the discussion or the oral settlement agreement, this Court orders that paragraph from page 2 of the proposed settlement agreement br stricken from the confirmed settlement order, and the confirmed settlement

agreement include only those other terms contained in that proposed settlement agreement. The Court has prepared a document containing the final settlement terms for this case and has attached that document to this Order as Appendix A.

In sum, while the defendants ask this Court to confirm the settlement agreement as they submitted it to plaintiff for his signature, this Court instead confirms the settlement agreement as it was orally agreed upon on October 25, 1989.

CONCLUSION

For the reasons set forth in the foregoing opinion, this Court holds that plaintiff did voluntarily agree to settle this lawsuit. Further, this Court holds that the terms of the settlement agreed upon on October 25, 1989 were those terms set out in the proposed settlement agreement Defendants' Exhibit 2) with the exception of the second full paragraph on page two of that proposed settlement agreement. Further, this court orders the second full paragraph of page 2 of the proposed settlement agreement to be stricken. Finally, this Court orders the settlement to be confirmed as outlined in this Order and attached as Appendix A.

E N T E R.

/s/ STANLEY J. ROSZKOWSKI,
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

**JUGRAJ SINGH DHALIWAL,
Plaintiff,**

v.

**WOODS DIVISION, HESSTON CORPORATION, a Kansas Corporation authorized to do business in Illinois and DAVID SCHIRER and MICHAEL DAWSON, Individual Agents of HESSTON,
Defendants.**

Case No. 86 C 20375

Filed May 31, 1990

ORDER

THIS MATTER coming on to be heard this 16th day of May, 1990 on the petition and the supplemental petition of defendant, WOODS DIVISION, HESSTON CORPORATION, for attorneys' fees, and the defendant appearing by its attorney, Henry J. Close, the court makes the following findings and orders:

1. The plaintiff was duly notified of the hearing in this matter and has failed to appear.

2. On October 25, 1989, the parties to this action entered into a Settlement Agreement reached that resolved all issues in the case.

3. The plaintiff subsequently failed to abide by the terms of the Settlement Agreement reached on October 25, 1989.

4. On January 3, 1990, the court ordered the plaintiff, JUGRAJ SINGH DHALIWAL, to reimburse defendant for attorneys' fees incurred as a result of the plaintiff's refusal to abide by the terms of the Settlement Agreement entered into in this matter on October 25, 1989.

5. As a result of the refusal of the plaintiff to abide by the terms of the October 25, 1989, Settlement Agreement, defendant became obligated for attorneys' fees for the services rendered by the following attorneys of Connolly, Close & Worden on the following dates:
   A. Henry J. Close, January 3, 1990, 1.5 hours in attendance at the continued settlement conference; January 31, 1990, .5 hours in attendance at a status conference.
   B. Thomas E. Laughlin, April 6, 7, and 9, 1990, 5 hours in preparation for a hearing to enforce the Settlement Agreement.

6. During the period of time covered by defendant's supplemental petition, Henry J. Close's normal hourly rate for the services performed by him was $125.00, which rate is fair and reasonable in the Rockford, Illinois, community.

7. During the period of time covered by defendant's supplemental petition, Thomas E. Laughlin's normal hourly rate for the services performed by him was $115.00, which rate is fair and reasonable in the Rockford, Illinois, community.

8. Defendant is entitled to reimbursement from plaintiff for attorneys' fees in the amount of One Thousand Fifty-Five and no/100 Dollars ($1,055.00) incurred as a result of plaintiff's refusal to abide by the October 25, 1989, Settlement Agreement.

It is hereby ordered that the plaintiff, JUGRAJ SINGH DHALIWAL, reimburse the defendant, WOODS DIVISION, HESSTON CORPORATION the sum of One Thousand Fifty-five and no/100 Dollars ($1,055.00) as and for attorneys' fees incurred by WOODS DIVISION, HESSTON CORPORATION resulting from the plaintiff's refusal to abide by the terms of the Settlement Agreement reached on October 25, 1989.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
UNITED STATES DISTRICT JUDGE

Prepared by:

Henry J. Close
CONNOLLY, OLIVER, CLOSE & WORDEN
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Supreme Court, U.S.
FILED
AUG 30 1991
OFFICE OF THE CLERK

Case No. 91-223

SUPREME COURT

OF THE UNITED STATES

October Term, 1991

JUGRAJ SINGH DHALIWAL,

Petitioner,

v.

WOODS DIVISION OF HESSTON CORP., DAVID SCHIRER, and MICHAEL DAWSON,

Respondents.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Case No. 91-223

SUPREME COURT

OF THE UNITED STATES

October Term, 1991

JUGRAJ SINGH DHALIWAL,

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v.

WOODS DIVISION OF HESSTON CORP., DAVID SCHIRER, and MICHAEL DAWSON,

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QUESTIONS PRESENTED

1. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision enforcing the settlement agreement between Petitioner and Respondents (responding to Petitioner's Questions 1, 2, and 3).

2. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision granting Defendant's Petition for Attorneys' Fees (responding to Petitioner's Question 4).

3. Whether any special and important reasons exist for this Court to

exercise its discretionary jurisdiction to review the District Court's decision granting Petitioner's attorney's Motion to Withdraw (responding to Petitioner's Question 5).

4. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision denying Petitioner's Motion for Appointment of Counsel (responding to Petitioner's Question 6).

LIST OF PARTIES

Petitioner is Jugraj Singh Dhaliwal.

Respondents are Woods Division of Hesston Corporation,[1] David Schirer, and Michael Dawson.

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[1]Woods Division is no longer a division of Hesston Corp., which has been acquired by another entity. Woods Division is now a division of Fiatallis North America, Inc., which is a wholly-owned subsidiary of Fiat, S.p.A.

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CITATIONS OF LOWER COURT OPINIONS AND JUDGMENTS

The Memorandum Opinion and Order, dated April 12, 1990, by which Judge Roszkowski of the Northern District of Illinois enforced the settlement agreement in Case No. 86-C-20375, is unreported, but is reproduced in the Petition for Writ of Certiorari, pages A-15 to A-24. Judge Roszkowski's Order granting Defendant Woods Division's Petition for Attorneys' Fees and Supplemental Petition for Attorneys' Fees is unreported, but is reproduced in the Petition for Writ of Certiorari, pages A-25 to A-28.

Petitioner's appeal of the Order enforcing the settlement agreement, of the Order granting Plaintiff's attorneys' Motion to Withdraw, and of the Order

granting Respondent Woods Division attorneys' fees were consolidated with Respondents' cross-appeal in the United States Court of Appeals for the Seventh Circuit, Case Nos. 90-2212, 90-2259, 90-2357. The Court of Appeals affirmed the District Court regarding Petitioner's appeals in an unpublished decision ("Seventh Circuit Opinion"), which is reproduced in the Petition at pp. A-3 to A-10, and at 1991 U.S. App. LEXIS 14745, and is cited in a Table at 930 F.2d 58. The Court of Appeals affirmed the District Court regarding Respondent's cross-appeal in a published decision reproduced in the Petition, pages A-10 to A-14, and at 931 F.2d 547. The Court of Appeals denied Petitioner's Petition for Rehearing in an

unpublished decision found at 1991 U.S. App. LEXIS 10,612.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing in an Order dated May 17, 1991. Petitioner moved to stay the issuance of the mandate. The Court of Appeals denied the motion in an Order dated July 12, 1991, and its mandate issued on July 18, 1991. Petitioner's Petition for Writ of Certiorari is dated July 31, 1991, and was filed in this Court and received by Respondent on August 5, 1991.

Petitioner claims jurisdiction based on 28 U.S.C. §1254(1).

RELEVANT STATUTES

...

"Upon application by the complainant and in such circumstances as the the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." 42 U.S.C. §2000e-5(f)(1).

STATEMENT OF CASE

The Equal Employment Opportunity Commission found no reasonable cause to believe that the allegations in Petitioner's charge were true. Petitioner's Complaint in the Northern District of Illinois, Western Division, dated August 25, 1986, alleged that Respondent Woods Division, Hesston Corp., and the other Respondents, its alleged agents, discriminated against him in his employment because of his national origin (India) and his alien status.

On October 25, 1989, Plaintiff and his attorney at that time, Brian P. Reese, and Attorneys Henry J. Close and Diane Klock and representatives of Defendants, Bo Vanman and Fred Scharer, held a

pretrial settlement conference with District Judge Stanley J. Roszkowski. (Memorandum Opinion and Order ("Opinion"), found in Appendix attached to end of the Petition for Writ of Certiorari ("Petition"), pp. A-16, A-18, and A-19, cited as "Opinion, Petition, pp. A-16, A-18, and A-19"). At this conference, Defendants and Plaintiff orally agreed that the case would be settled on the following terms: Defendants' payment to Plaintiff of Twelve Thousand and no/100 Dollars ($12,000.00) in cash, no admission of liability by Defendants, and no reinstatement for Plaintiff. Id. "[T]he foundation for a settlement was agreed to in the presence of [the District] Court." Id. at A-19.

Defendants' counsel presented to Plaintiff and his counsel a draft written document memorializing the terms of the oral agreement reached on October 25, 1989. (Opinion, Petition, A-19). Plaintiff refused to execute the draft document, claiming that he had not agreed to a provision in the draft that barred him from reapplying to Defendant Woods or any of its related parties at any location. Defendants and Plaintiff could not agree on a written document that reflected their oral agreement. (Opinion, Petition, p. A-20).

Defendant Woods petitioned to enforce the settlement agreement and for attorneys' fees because Plaintiff refused to comply with the settlement agreement.

The fees requested were for preparation for court appearances, and court appearances and status conferences on January 3 and 31, February 14, and April 9, 1990. The attorneys' fee petitions were supported by affidavits.

On January 3, 1990, the District Court also granted Petitioner's attorney's motion to withdraw. The District Court denied Petitioner's motion requesting that the District Court appoint him counsel on February 2, 1990, stating that Petitioner had admitted he could afford to pay counsel.

SUMMARY OF ARGUMENT

I. NO SERIOUS AND IMPORTANT QUESTION JUSTIFIES REVIEW OF THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

A. The Lower Courts Committed No Factual Error By Enforcing the Settlement Agreement

Under relevant law, repudiation of a settlement agreement of a Title VII suit requires an unequivocal declaration of intent by the party not to perform. A mere inconsistency in draft written settlement agreements is not such an unequivocal declaration.

Petitioner, on the other hand, contends that Respondent repudiated the oral settlement agreement by including a disputed provision in the draft written agreement (barring Petitioner from reapplying to work for Respondent), and

contends that he therefore has no further obligations under that agreement. Since the District Court did not enforce the disputed provision against Petitioner, Petitioner has not been harmed by it.

Moreover, the District Court found as a fact that Petitioner was seeking to avoid the agreement by demanding more money and that Respondent, which moved to enforce the settlement agreement, had not been seeking to avoid the agreement. Petitioner, despite his purported objection to the disputed provision, has never offered to sign the settlement agreement without it. Respondent has never denied the settlement agreement or threatened not to pay the agreed amount. Finally, the fact that Petitioner waited

to ask for more money until after Respondent included the disputed provision in the draft settlement agreement is irrelevant, because Respondent has failed to meet his burden of showing that Petitioner repudiated the agreement by including the draft provision.

B. The Lower Courts Committed No Legal Error By Enforcing The Settlement Agreement

Petitioner does not dispute the applicable legal standard to show repudiation of a settlement agreement, which requires an unequivocal declaration of intent not to perform. Petitioner admits that Respondents made no such declaration.

Respondents would not have repudiated the oral settlement agreement even if,

contrary to the facts, they had stated they would not execute a written agreement unless it contained the disputed provision. The oral settlement agreement did not require the execution of a written settlement agreement, so refusing to execute one would not have declared an intent not to perform the oral settlement agreement.

C. This Case Does Not Justify Discretionary Review

This case turns on the resolution of disputed facts. None of the factors justifying discretionary review are present here, and the departure "from the accepted and usual course of judicial proceedings" alleged by Petitioner is nothing more than a reiteration of

Petitioner's disagreement with the lower courts' factual conclusions.

II. NO SERIOUS AND IMPORTANT QUESTION REQUIRES REVIEW OF THE AWARD OF ATTORNEY'S FEES TO RESPONDENTS

The District Court clearly has the authority to award attorney's fees as a sanction for avoiding a settlement. Petitioner's arguments for the impropriety of the award are nothing more than factual quibbles with the findings of the District Court and Court of Appeals.

III. NO SERIOUS AND IMPORTANT QUESTION EXISTS AS TO ALLOWING PLAINTIFF'S ATTORNEY TO WITHDRAW

The District Court did not abuse its discretion by allowing Petitioner's attorney, who disagreed with Petitioner regarding settlement, to withdraw. The opportunity to respond to his attorney's

withdrawal motion that Petitioner seeks would have been futile, since it would further point out the disagreement. Seventh Circuit Rule 51(a), which requires notice to the client when court-appointed counsel withdraws on the basis that an appeal is frivolous, does not apply since Petitioner's former counsel was private counsel who withdrew in the District Court on the basis that he disagreed with Petitioner regarding settlement.

IV. THE DISTRICT COURT'S REFUSAL TO APPOINT COUNSEL FOR PLAINTIFF RAISES NO SERIOUS OR IMPORTANT ISSUE

Of the three factors required to be satisfied before appointing counsel, Petitioner fails to satisfy two. Petitioner is fully able to pay counsel. Moreover, as found by the EEOC, his

lawsuit is not meritorious. The District Court therefore did not abuse its discretion by refusing to appoint counsel for Petitioner.

ARGUMENT

I. NO SERIOUS AND IMPORTANT QUESTION JUSTIFIES REVIEW OF THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

A. The Lower Courts Committed No Factual Error By Enforcing The Settlement Agreement

A settlement of a Title VII claim that is knowingly and voluntarily made is binding on the parties. Taylor v. Gordon Flesch Co., 793 F.2d 858, 862 (7th Cir. 1986); Glass v. Rock Island Refining Corp., 788 F.2d 450, 454-55 (7th Cir. 1986). Such a binding agreement is not repudiated unless a party unequivocally declares his intent not to perform under the agreement. Taylor, 793 F.2d at 864.

The Taylor court held that a conflict in the terms of the draft agreements prepared by the different parties did not

show an unequivocal declaration of intent not to perform. Taylor, 793 F.2d at 864. The court said:

> "[A]ny inconsistency which existed clearly did not amount to an expression by the Company that it did not intend to perform its obligations under the oral settlement agreement." Taylor, 793 F.2d at 864.

In this case, the District Court found as a fact, after an evidentiary hearing, that on October 25, 1989 the parties had orally agreed to a settlement as follows:

1. Respondent Woods would pay Petitioner $12,000;

2. Respondents would not admit liability; and

3. Petitioner would not be reinstated. (Opinion, Petition, p. A-19).

The Court of Appeals affirmed the District Court's finding of facts.

The District Court also decided to exclude from the written settlement agreement it confirmed a provision barring Petitioner from reapplying to Respondent Woods. The District Court stated that Petitioner had not explicitly agreed to the provision. This question was raised in Respondent's cross-appeal, and the Court of Appeals also affirmed the District Court on that question. Respondent did not seek rehearing in the Court of Appeals concerning this issue and has not filed a cross-petition in this Court.

Petitioner, while admitting that he agreed to a settlement with Respondents,

contends that he never agreed to a settlement provision barring him from reapplying to Respondent Woods. Petitioner was not injured by the disputed provision because it was not included in the settlement agreement enforced by the District Court and upheld by the Court of Appeals.

Petitioner also contends, however, that Respondent repudiated the oral settlement agreement by including the bar to reapplication in a draft agreement, and that this repudiation gave Petitioner the right to reject the entire oral settlement agreement, to which he admits he agreed. This core contention is the basis of the Petition.

This contention is incorrect. The record shows that, after the oral settlement agreement was reached, Petitioner refused to sign a settlement agreement and Respondents moved the District Court to enforce the settlement agreement. (Seventh Circuit Opinion, Petition, p. A-8). Respondent consistently took the position that the settlement agreement should be enforced with the disputed provision. Petitioner just as consistently took the position that he was not bound by the agreement at all because Respondents included a provision he disputed.

Even under Petitioner's wildly inaccurate version of the facts, Respondent did nothing more than send a

draft settlement agreement and argue that its provisions were part of the agreement. Respondent never stated that it would not pay the settlement amount or that the deal was off. (Seventh Circuit Opinion, Petition, p. A-8).

Petitioner, on the other hand, determined on reflection that he was entitled to more money. (Opinion, Petition, p. A-17; Seventh Circuit Opinion, Petition, p. A-8). This determination came shortly after the oral settlement agreement was reached on October 25, 1989, since Petitioner "placed his demand for higher compensation on January 3, 1990." (Petition, p. 12). Yet, in the face of these facts, Petitioner maintains that Respondents

repudiated the settlement agreement and that he is now free to seek more money.

Petitioner's objections based on the disputed provision are therefore a sham to cover his determination to get more money. Petitioner has never offered to execute the settlement agreement without the disputed provision. (Seventh Circuit Opinion, Petition, p. A-8).

Petitioner also wastes considerable ink arguing that he did not try to avoid enforcement of the oral settlement, because he did not demand more money immediately after the agreement. Since Petitioner has not carried his burden of showing that Respondents repudiated the

settlement agreement, his alleged forbearance is irrelevant.[2]

B. The Lower Courts Committed No Legal Error By Enforcing The Settlement Agreement

The applicable legal standard is actually undisputed. Although Petitioner calls the Appellate Court's standard for repudiation (requiring an unequivocal declaration of intent not to perform) "rather puzzling because it seems to

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[2]Respondent also strenuously objects to Petitioner's attempt to argue to this Court based on irrelevant documents never presented to any court below, or even to this Court. (See references to the following: to Defendants' February 7, 1990 letter to Plaintiff (Petition, p. 8); to February 3, 1990 letter from Plaintiff to Defendants (Petition, pp. 9, 12); and to Defendants' letter of February 7, 1990 (Petition, p. 12)). Petitioner's descriptions of these documents, which are not in the record, are inaccurate and misleading.

justify the [Respondents'] actions of including a not agreed-to-term," he proposes no other standard and has cited the same cases relied upon by Respondent below. Petition, pp. 10-11, 13-14.

Petitioner even admits that "Defendants did not unequivocally declare their intent not to perform." Petition, p. 16. Even though Petitioner inaccurately claims that Respondents said they would not execute an agreement without the disputed provision, such a statement would not be a declaration of intent not to perform the oral settlement agreement, even if it had been made (which it was not). Petitioner has never contended, and no court has found, that the oral settlement agreement required an

agreed written document before it was final. In the absence of that kind of provision, the failure to arrive at such a written agreement "simply leaves an agreement which, if not honored, a party will be forced to protect by proving the existence and terms of the oral agreement. Though in practical terms this proof may be difficult to make, the oral agreement is no less binding." Taylor, 793 F.2d at 862. Consequently, even if Respondents had refused to execute the agreement without the disputed term, such a refusal would not have declared their intention not to perform the oral agreement, because the oral agreement did not have a term requiring the execution of a written agreement.

C. This Case Does Not Justify Discretionary Review

This case would present no serious and important questions under Supreme Court Rule 10.1, even if Petitioner's legal and factual arguments were correct. First, this case turns on the specific facts of one situation. The lower courts relied heavily on the facts about the content of the oral agreement, and the finding that Respondents did not repudiate the oral agreement. The District Court actually observed the "foundations" for the oral agreement. This Court would not be in a better position than the District Court to address such factual questions, and should not exercise its discretion to attempt to

do so.

Second, none of the reasons that support the exercise of the Court's discretion are present. See Supreme Court Rule 10.1. Of those reasons listed in Rule 10.1, Petitioner argues only that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10.1.(a); Petition, p. 7. On examination, these "departures" from the "accepted course" are nothing more than Petitioner's contentions that, as a matter of fact, the lower courts should have found that Respondents really repudiated the settlement agreement.

Petitioner points to no conflict among circuits, and no conflict with the state courts. No question of law exists: Petitioner does not dispute the legal standards employed by the lower courts.

II. NO SERIOUS AND IMPORTANT QUESTION REQUIRES REVIEW OF THE AWARD OF ATTORNEY'S FEES TO RESPONDENTS

The District Court clearly had the inherent power to enforce settlements by an award of attorneys' fees. DeBose v. Mueller, 552 F. Supp. 307 (N.D. Ill. 1982).

The District Court found that the October 25, 1989 settlement agreement had resolved all issues in the case and that Petitioner later failed to abide by that agreement. (Order dated May 31, 1990, Petition, p. A-26). The Court of Appeals

found no abuse of discretion in that decision, holding that the record showed Petitioner:

> "sought to escape from the entire agreement as a result of the inclusion of this term [barring reapplication]. In light of this fact and Mr. Dhaliwal's contention that he was entitled to a greater sum of money than contained in the settlement, the district court did not abuse its discretion by awarding attorneys' fees to the [Respondents]." (April 16, 1991 Order of Seventh Circuit ("Seventh Circuit Order"), Petition, p. A-9).

Petitioner again argues that, because Respondents included a disputed term in the draft written agreement, he was entitled to ignore the entire settlement agreement. (Petition, p. 17). Both lower courts correctly rejected this argument and concluded that Petitioner's attempts to avoid complying with the settlement

agreement supported an award for attorneys' fees.

Petitioner also argues that the Court of Appeal's affirmance of the award of attorneys' fees conflicts with its finding "that [Petitioner's] refusal was not made in subjective bad faith." (Petition, p. 17). Actually, the Court of Appeals merely concluded that Petitioner's "refusal to sign the memorialized settlement agreement arguably was not made in subjective bad faith." (Seventh Circuit Order, Petition, p. A-9 (emphasis added)). Moreover, subjective bad faith is not required. The DeBose court made no finding of subjective bad faith before awarding attorneys' fees for failure to comply with an oral settlement agreement.

DeBose, 552 F. Supp. at. 308.

III. NO SERIOUS AND IMPORTANT QUESTION EXISTS ABOUT ALLOWING PLAINTIFF'S ATTORNEY TO WITHDRAW

"The grant or denial of an attorney's motion to withdraw in a civil case is a matter addressed to the discretion of the trial court and will be reversed on appeal only when the trial court has abused its discretion." Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir. 1982). Such an abuse occurs only "where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion has been shown." Washington, 694 F.2d at 1087. The District Court granted Petitioner's attorney's motion to withdraw

on the basis that he disagreed with Petitioner concerning Petitioner's attempt to renege on the settlement agreement. Under Washington, an attorney should be permitted to withdraw when he disagrees with his client about a settlement. Washington, 694 F.2d at 1087. Based on the evidence received by the District Court, the District Court's action was more than reasonable.

Petitioner now seems to be arguing for the first time in any court that he should have had an opportunity to respond to his attorney's motion to withdraw (Petition, p. 18), so that the District Court could discern the actual reason Plaintiff's counsel moved to withdraw. Clearly, no judicial purpose would have been served by

such an absurd proceeding. Any opposition by Petitioner to his counsel's withdrawal based on the circumstances of settlement would have <u>further</u> shown the disagreement between counsel and client regarding settlement. Petitioner has never stated any other basis on which he would have opposed withdrawal.

Petitioner does not even contend that his attorney should not have been allowed to withdraw - only that he should have been allowed to respond to the Motion for Withdrawal. His basis for requiring such an opportunity appears to be Rule 51(a) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit. Rule 51(a) requires the Seventh Circuit clerk to notify a client when

court-appointed counsel move to withdraw on the basis that a suit is frivolous. Since Petitioner's counsel did not withdraw while this case was in the Court of Appeals, his counsel was not court-appointed, and Petitioner's counsel did not withdraw on the basis that the suit was frivolous, Rule 51(a) is no help to Petitioner.

Accordingly, the Court should not exercise its discretionary jurisdiction to review this issue.

IV. THE DISTRICT COURT'S REFUSAL TO APPOINT COUNSEL FOR PLAINTIFF RAISES NO SERIOUS OR IMPORTANT ISSUE

Respondent believes that Petitioner purports to rely on 42 U.S.C. §2000e-5(f)(1). Petition, p. 19. As Petitioner admits, appointment of counsel under this

statute is within the court's discretion. §2000e-5(f)(1). The District Court properly refused to exercise that discretion to appoint counsel for Petitioner.

By his own admission, Petitioner fails to qualify for appointed counsel.

> "In considering whether to appoint counsel, the Court must consider three factors: (1) the plaintiff's financial ability to retain counsel; (2) the plaintiff's diligence in attempting to obtain counsel; and (3) the merits of the plaintiff's claim. Any one of these factors alone may be determinative.
>
> ...
>
> Because all three factors should be satisfied before counsel is appointed, the Court denied plaintiff's motions for appointment of counsel." Adams v. Lever Brothers Co., 734 F. Supp. 815 (N.D.Ill. 1990).

The plaintiff seeking appointed counsel must show financial inability to

pay counsel. Arnold v. Speedgrip Chuck, Inc., 524 F. Supp. 679, 681 (N.D.Ind. 1981). "The fact that it is merely burdensome to pay counsel is not sufficient." Arnold, 524 F. Supp. at 681.

Here, Petitioner has admitted in every court that he is able to pay counsel. Petitioner again admits his ability to pay to this Court. (Petition, p. 19).

Petitioner also fails to qualify for appointed counsel because his claim is not meritorious, despite his claim that "his case is very strong." (Petition, p. 19). Courts rely on the EEOC's findings to help determine whether a case is meritorious. Robinson v. Western Electric, 3 Empl. Prac. Dec. (CCH) ¶8240, 3 Fair Empl. Prac. Cas. (BNA) 846 (7th Cir. 1971). In this

case, the EEOC found no reasonable cause to believe Mr. Dhaliwal's allegations were true.

Since Petitioner fails on at least two of the three required factors to be considered in appointing counsel, the District Court did not abuse its discretion in denying Petitioner appointed counsel.

CONCLUSION

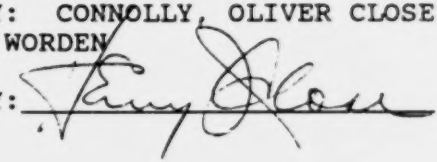
Petitioner not only fails to raise any serious and important question justifying a writ of certiorari, he fails to show any error by the Court of Appeals in affirming the District Court. This Court should therefore deny the writ.

Respectfully submitted,

Respondents

WOODS DIVISION, HESSTON CORP., DAVID SCHIRER, and MICHAEL DAWSON

BY: CONNOLLY, OLIVER CLOSE & WORDEN

BY: 

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Dated: August 30, 1991

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be placed in the United States mail, with first-class postage prepaid, to:

Jugraj Singh Dhaliwal
740 G Street
Los Banos, CA 93635

three copies of the foregoing Brief In Opposition To Petition For Certiorari on August 30, 1991. All required parties have been served. The attorneys' are:

For Petitioner
Jugraj Singh
Dhaliwal
(Above)
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Schirer, Michael Dawson
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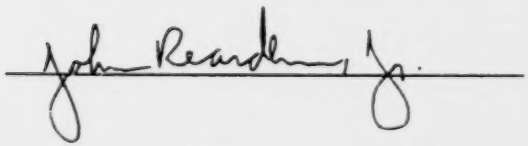

Supreme Court, U.S.
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CASE NO. 91-223

In The
Supreme Court of the United States

OCTOBER TERM, 1991

JUGRAJ SINGH DHALIWAL

Petitioner,

v.

WOODS DIVISION OF HESSTON CORP and DAVID SCHIRER and MICHAEL DAWSON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Decisions Of The Court Of Appeals And The District Court Are In Direct Conflict With Rule 52 Of The Federal Rules Of Civil Procedure And So Far Depart From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.

The Court of Appeals' decision and the District Court's decision are in direct conflict with Rule 52 of the Federal Rules of Civil Procedure. Rule 52(a) contains a clear and unambiguous statement that findings of fact must be set aside if they are determined to be clearly erroneous; a finding must be set aside if it is against the clear weight of the evidence. *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Grubb v. W.A. Fotte Memorial Hospital, Inc.*, 741 F.2d 1486, 1494 (6th Cir. 1984); *vacated on rehearing on other grounds*, 759 F.2d 546 (6th Cir. 1985); *cert. denied* 474 U.S., _____, 88 L.Ed.2s 284, 106 S.Ct. 342 (1985).

Here, key findings of fact were made by ignoring the evidence. There is written evidence that Respondents insisted that the not-agreed-to no application provision must be included in the agreement. There is written evidence that Petitioner had informed the Respondents that the no application provision was not agreed to on October 25, 1989. There is written evidence that the Petitioner had proposed on February 3, 1990 to settle the case out of court. This proposal was made 31 days after the parties could not reach an agreement at the second settlement conference on January 3, 1990. There is

written evidence that Respondents had declined the offer on February 7, 1990 (Appendix 1) and refused to hold a meeting to resolve the issues. The documents referred to above are in record and were presented to the lower court. The Petitioner has also submitted to the District Court testimony that has revealed that even those still employed by the Respondents state that the Petitioner had rendered consistent superior performance and that he was able to work well with other employees and to get along with them and be helpful.

Petitioner did not refuse to sign a valid contract; Respondents never submitted a valid contract. The document prepared by the Respondents contained a not-agreed-to term. Respondents admitted that the no application term was not discussed at the settlement conference on October 25, 1989. Respondents admit that they consistently took the position that the settlement agreement should be enforced with the not-agreed-to term (Brief in opposition, p. 23). Respondents had not paid the $12,000 and had failed to meet their obligation.

Respondents scheduled the second settlement conference of January 3, 1990 to include the new term. It was held in the courthouse in the presence of the Honorable Judge and was conducted in the same manner as the first conference on October 25, 1989. Respondents stood firm to make the no reapplication provision a part of the agreement, and parties could not reach an agreement. Respondents admit that the Petitioner placed his demand to change the compensation term during the discussion at the second conference, which is clearly 61 days after the Defendants' insistence on including a new term.

The Courts completely ignored the key evidence and the undisputed facts explained above and selectively choose the events out of sequence to arrive at their decisions. Some of the decisions are in conflict with their own findings. The Court of Appeal's review of the facts and events does not seem to follow any logical pattern. The Court of Appeals failure to apply Rule 52(a), which provides that courts "shall find the facts specially and state separately its conclusion of the law thereon," to this case constitutes a gross departure from the accepted course of judicial proceedings and calls for an exercise of this Court's power of supervision.

II. The Decision Of The Appellate Court Is In Direct Conflict With Its Decision In *Taylor v. Gordon Flesch Co., Inc.* 793 F.2d 858, 864 (7th Circuit 1986).

Generally, a party must unequivocally decline his/her intent not to perform his/her obligation under a contract before he/she is said to have repudiated it. *Taylor v. Flesch Co.*, 793 F.2d 858, 864 (7th Circuit 1986). This is not a rigid standard as the Appellant Court for the 7th Circuit did not itself follow this standard in the same case (*Taylor* at 864) to address the issue "whether the alternative language proposed by [defendants] repudiated the agreement." In *Taylor*, the court compared the two drafts prepared by Plaintiff's and Defendants' attorneys to find evidence of the requisite unequivocal declaration which would be capable of supporting a finding of repudiation. What that evidence should be in the Defendants' draft is not difficult to find. This evidence had to be either the addition of a not-agreed-to term or the deletion of an agreed-to material term, because the existence of the

nonmaterial terms and stylistic changes in the draft is not such an unequivocal declaration.

The Respondents other arguments based on the *Taylor* court are irrelevant in light of the fact that in *Taylor*, the court addressed this issue at the very end, on page 864. If this issue had no bearing on the court's decision, the court could have simply ignored it. Also, if the inclusion of a not-agreed-to material term in the Defendants' written draft of the oral agreement would not repudiate the oral agreement, the court could not have wasted valuable judicial time in comparing the two drafts.

In this case, the lower courts did find a not-agreed-to new material term in the Respondents' draft. Petitioner produced for the the lower courts additional written evidence, pointing out the Respondents' absolute insistence that the not-agreed-to no application provision must be included in the draft (Respondent's November 3, 1989 letter, petition page 4). Respondents admitted that the no application provision was not explicitly discussed. Respondents consistently took the position that the settlement agreement should be enforced with the above mentioned provision (Brief in opposition, p. 23).

The inclusion of a new material term in the written agreement and the absolute insistence by the Respondents on the inclusion of this term in the agreement do provide the evidence of the requisite, unequivocal declaration capable of supporting a finding of repudiation required by *Taylor* at 864. It clearly amounts to an expression by the Respondents that they did not intend to perform their obligation under the oral agreement. They had not met their obligation as they had not paid $12,000 yet. Thus, the

Respondents' inclusion of new material terms in the written expression of the oral settlement amounted to a repudiation of the oral agreement as a matter of law.

III. The Simple Unanswered Question Justifies Review Of This Case By The Highest Court Of Justice.

Where the Respondents would not accept the agreement without the not-agreed-to term and consistently took the position that the settlement agreement should be enforced with the disputed provision (Respondents brief in opposition, p. 23), how could have the Petitioner prevented the Respondents from petitioning the District Court to enforce the settlement agreement containing the not-agreed-to term and avoid attorneys' fees? Could the Agreement have been consummated if the Petitioner had not placed his demand for higher compensation? The answer is NO because the parties could not execute it from October 25, 1989, to January 3, 1990 for a period of 70 days during which Petitioner had not asked to alter the compensation term. Could the agreement have been executed if the Petitioner had withdrawn his demand for higher compensation? The answer again is NO because the agreement without the no reapplication term was not acceptable to the Respondents. Could the agreement have been consummated if the record had shown that the petitioner had agreed to the terms of the settlement agreement except for the disputed provision? The answer again is NO due to Respondents absolute insistence that the not-agreed-to no application provision must be included in the agreement (Petition, p. 4).

This agreement could have been consummated only if the Petitioner had accepted the unfair demand of the Respondents to include the not-agreed-to no application provision. This unfair demand of the Respondents to include the not-agreed-to no application provision closed all the doors for a negotiated settlement agreement.

Petitioner could not pose this question to his attorney because his (petitioner's attorney's) oral motion to withdraw was granted in the Petitioner's absence. Both the lower court's did not gave a satisfactory answer to this question because Petitioner does not possess the skills of an experienced attorney to argue this case effectively. The court of appeals for the seventh circuit has recognized this predicament of a pro-se plaintiff in *Caruth v. Pinkey* 683 F.2d 1044, 1049 (7th Cir. 1982):

> "by appointing counsel in appropriate cases, a district court not only insures that meritorious claims of the pro-se plaintiff are not defeated, but also eases the burden placed both on the district court and on this court when a skilled attorney presents a case."

That is why the Petitioner offered to pay the fees of the court-appointed attorney as required by District Court Rules 3.86 and 3.87, so that his meritorious claim would not be defeated, which has already happened in this case.

The no application provision is a new term (Opinion, Petition, p. A-23; Seventh Circuit Opinion, Petition, p. A-12). The lower courts' logic that the Respondents' action to include a new term did not amount to a repudiation whereas the Petitioner's

belated request, made 61 days after the Respondents' action to alter one existing term, did amount to a repudiation, is astonishing. After all, the Petitioner's demand for more compensation was merely an alteration in the compensation term.

Is not the Respondents' letter of November 3, 1989 (Petition, p. 4) the necessary evidence to prove that the Respondents reflected on the ORAL agreement and felt they should include the not-agreed-to no application provision in the written agreement to keep the petitioner out of their hair? If Respondents' absolute insistence that this provision must be included and their refusal to agree to a meeting to resolve this issue (February 7, 1990 letter, p. A-1) would not repudiate the contract, then what evidence would repudiate the contract? Now, it is up to highest court in the land to decide how the Petitioner could have satisfied the Respondents without accepting their demand of inclusion of a not-agreed-to no application provision in the agreement. What law had been violated by the Petitioner when he refused to sign the agreement which included a not-agreed-to provision?

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Dhaliwal 9-13-97

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PRO-SE

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LETTER from CONNOLLY, OLIVER, CLOSE & WORDEN to JUGRAJ SINGH DHALIWAL

Dated February 7, 1990

RE: Dhaliwal v. Woods Division,
Hesston Corp.,
Case No. 86 C 20375

Dear Mr. Dhaliwal:

I am writing to you in response to your letter to Henry Close. I am writing to you directly as we have not been notified that an attorney has filed an appearance on your behalf in this case.

Our client would not be interested in another meeting to attempt to resolve that matter at this time. The meeting held on January 3, 1990, was a waste of everybody's time. An agreement was reached at the settlement conference on October 25, 1989. A written settlement agreement was drafted based on that agreement and sent to you for signature. Our client is very willing to comply with the terms of that agreement. Your signature on that agreement would result in a final resolution of this case. We are not willing, however, to reopen negotiations when an agreement has already been reached.

Please feel free to contact our office again if you have questions regarding our position.

/s/ Diane R. Klock
for CONNOLLY, OLIVER, CLOSE & WORDEN

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LETTER from JUGRAJ SINGH DHALIWAL to HENRY CLOSE

Dated February 3, 1990

RE: Dhaliwal v. Woods Division, Hesston Corp.

Dear Mr. Close:

I agree with the honorable judge and you that the case has been dragging on for a very long time. I am writing this letter to assure you that I am very anxious to get it decided as soon as possible.

I believe we can also settle ourselves. I am proposing a committee consisting of you, Fred Scharer, Hank Kasper, Ed McCanse, my counsel, and myself and request you to explore the possibilities of a meeting. If you wish, you can also include Carol Long and Bo Vanman in the committee. I am planning to be in the Chicago area on February 12th and 13th, 1990. I look forward to hearing from you by Friday, February 9th, 1990 so that we can meet before attending the court.

/s/ Jugraj Singh Dhaliwal

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be mailed, with proper postage prepaid, to:

Henry J. Close
John Reardon, Jr.
CONNOLLY, OLIVER, CLOSE
& WORDEN
P.O. Box 4749
Suite 300, 124 No. Water Street
Rockford, Illinois 61110-4749

three copies of the foregoing reply to brief in opposition to petition for writ of certiorari.

Dhaliwal 9-13-91

Jugraj Singh Dhaliwal
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